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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN GUMERSELL, Plaintiff, v. NESTLÉ WATERS NORTH AMERICA INC., Defendant.	Civil Action No. [Superior Court of New Jersey, Law Division, Somerset County, Docket No. SOM-L-19-17] **NOTICE OF REMOVAL OF A CIVIL ACTION**

TO: William T. Walsh, Clerk
United States District Court for the
District of New Jersey
Clarkson S. Fisher Building &
U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

Maureen V. Abbey, Esq.
Heninger Garrison Davis, LLC
535 Boulevard
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Attorneys for Plaintiff

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SIR & MADAME:

PLEASE TAKE NOTICE that defendant Nestlé Waters North America Inc. ("NWNA") hereby removes this action, pursuant to the provisions of 28 U.S.C. §§1332, 1441, 1446 and 1453, from the Superior Court of New Jersey, Law Division, Somerset County (Docket No. SOM-L-19-17), to the United States District Court for the District of New Jersey, and respectfully states the following grounds for removal:[1]

Background

1. On January 6, 2017, plaintiff John Gumersell ("Plaintiff"), on his own behalf and allegedly on behalf of others similarly situated, commenced this civil action by filing a complaint against NWNA in the Superior Court of New Jersey, Law Division, Somerset County, captioned *John Gumersell v. Nestlé Waters North America Inc.*, Civil Action No. SOM-L-1917 (the "Complaint"). A true copy of the Complaint is annexed as Exhibit "A." Plaintiff named NWNA as the sole defendant in the Complaint.

2. On February 1, 2017, NWNA was served with a Summons and Complaint.

3. No proceedings have taken place in this action.

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[1] This Notice of Removal is filed without prejudice to NWNA's rights, claims and defenses in connection with this matter, all of which are hereby expressly reserved.

4. The Superior Court of New Jersey, Somerset County, is located within the District of New Jersey.

Nature of the Action

5. This Notice of Removal is timely filed with this Court pursuant to 28 U.S.C. §1446(b)(1), as it is being filed within thirty (30) days of NWNA receiving from Plaintiff a copy of the Complaint.

6. NWNA has received no process, pleadings, orders or other papers in connection with this action except for a copy of the Summons and Complaint.

Diversity Jurisdiction Pursuant to CAFA

7. This Court has original jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1332(d)(2), as this civil action is a "class action" and the amount in controversy exceeds the sum of $5 million dollars, exclusive of interest and costs.

Citizenship

8. Plaintiff brings this action on his own behalf and allegedly on behalf of all persons and entities in New Jersey who paid NWNA a Fuel Surcharge during the period starting January 6, 2011 through the date that class notice is given. (Compl. ¶¶6, 8).

9. This action is a "class action" under CAFA, as it is a "civil action filed under . . . [a] State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. §1332(d)(1)(B).

10. Plaintiff is a citizen of New Jersey. (Compl. ¶6).

11. NWNA is a corporation organized under the laws of the State of Delaware and has its principal place of business in Stamford, Connecticut. (Compl. ¶7).

12. Members of the putative class are citizens of a State different from NWNA. (Compl. ¶8).

13. 28 U.S.C. §1332(d)(2) applies to this action, as the number of members of the proposed class exceeds one hundred. (See Declaration of Eric Lord attached hereto as Exhibit B ("Lord Decl.").

14. Accordingly, diversity of citizenship exists pursuant to CAFA between members of the putative class of New Jersey citizens, on the one hand, and defendant NWNA, on the other hand. *See* 28 U.S.C. §1332(d)(2)(A).

Amount in Controversy

15. Under CAFA, the amount-in-controversy required for a "class action" is $5,000,000, exclusive of interest and costs. 28 U.S.C. §1332(d)(2). In

calculating the amount-in-controversy, "the claims of the individual class members shall be aggregated." 28 U.S.C. §1332(d)(6).

16. Plaintiff alleges that NWNA engaged in unconscionable, fraudulent, deceptive and unfair practices in charging customers a Fuel Surcharge in violation of the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, *et seq*. [Compl. ¶¶24-28]. Plaintiff seeks, on behalf of himself and the putative class, money damages; trebling of money damages; and attorneys' fees and costs, pursuant to the CFA. (Compl. Prayer For Relief). Additionally, Plaintiff seeks, on behalf of himself and the putative class, restitution and repayment of "all Fuel Surcharges." [*Id.*]

17. According to NWNA's records, since January 2011, more than $5,000,000 of Fuel Surcharges have been paid by New Jersey customers. (Lord Decl., ¶3). The total aggregated amount of the putative class members' claims for actual damages, treble damages, and attorneys' fees exceeds $5,000,000. CAFA's amount-in-controversy requirement is satisfied. 28 U.S.C. §1332(d)(2).

18. Because diversity of citizenship exists between at least one member of the putative class and defendant NWNA, and the amount-in-controversy exceeds $5,000,000, this Court has original jurisdiction over this action pursuant to CAFA. 28 U.S.C. §1332(d)(2).

19. Pursuant to 28 U.S.C. §1446(d), copies of this Notice of Removal were served upon Plaintiff's counsel and filed with the Clerk of the Superior Court of New Jersey, Law Division, Somerset County.

WHEREFORE, Defendant Nestlé Waters North America Inc. hereby removes this action from the Superior Court of New Jersey, Law Division, Somerset County to the United States District Court for the District of New Jersey.

Dated: March 3, 2017

Respectfully submitted,

ORLOFF, LOWENBACH,
STIFELMAN & SIEGEL, P.A.

By:*/s/ Jeffrey M. Garrod*
Jeffrey M. Garrod

Attorneys for Defendant
Nestlé Waters North America Inc.

EXHIBIT A

RECEIVED ONLY FILED
SUPERIOR COURT OF NJ
SOMERSET COUNTY

2017 JAN -6 A 11:02

DEPUTY CLERK
CIVIL DIVISION

REVIEWED

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Application for admission pro hac vice to be filed

Attorneys for Plaintiff

004
143085
$250

JOHN GUMERSELL, Plaintiff, v. NESTLE WATERS NORTH AMERICA, INC., Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - SOMERSET COUNTY Civil Action No. L-19-17 **COMPLAINT AND JURY DEMAND** **CLASS ACTION**

CLASS ACTION COMPLAINT

1. Plaintiff, John Gumersell, individually and on behalf of a class of all New Jersey persons or entities who are similarly situated, and files this Class Action Complaint against the Defendant, Nestle Waters North America, Inc. ("Nestle").

NATURE OF THE CASE

2. Nestle is the largest producer of bottled water in the world. Nestle produces and delivers bottled water and other beverages to companies and individuals, such as Mr. Gumersell, in exchange for a set rate. However, in addition to this rate, Nestle also charged its New Jersey customers a fee it calls a "Fuel Surcharge". Nestle purportedly charges the Fuel Surcharge to recover the increased fuel costs it incurs in delivering its products to its customers. Similarly, by using the term "Fuel Surcharge, Nestle represents to customers that this Fee varies in accordance with Nestle's related increased costs and that the revenue from the Fuel Surcharge is used to offset those increased costs.

3. Nestle's representations, omissions, and practices in charging the Fuel Surcharge are deceptive and unfair. Nestle does not use the proceeds from the Fuel Surcharge to offset its increased fuel costs (or its actual fuel costs). Further, Nestle includes any increased fuel costs it might incur in providing its services in the rates it charges customers, such that Nestle already recovers 100% of its increased fuel costs through its base rates. Nestle uses the Fuel Surcharge simply to generate extra profit at its customers' expense, all the while deceiving customers into believing that the fee is a legitimate charge directly related to actual increased fuel costs it incurs.

4. Nestle's conduct constitutes a violation of New Jersey's Consumer Fraud Act (N.J. Stat. Ann. § 56:8-2). Further, this case presents a prototypical situation for class treatment. Nestle's conduct—including all relevant practices, deceptions, representations, and omissions—is uniform among all customers. The application of New Jersey law to a shared course of conduct will determine liability for the class as a whole, ensuring that the rights of thousands of small businesses and individuals are vindicated through the efficiency of a single trial.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action and venue is proper in this Court. Nestle is a corporation which does business in Somerset County, New Jersey. Nestle has received substantial revenue and profits from the improper Fuel Surcharges in Somerset County, New Jersey. Nestle has an office and location in Somerset County, New Jersey. Plaintiff resides in Somerset County, New Jersey. The conduct giving rise to Plaintiff's claims and to the claims of each putative class member occurred in New Jersey. Plaintiff's claims arise solely under New Jersey Law and Plaintiff makes no claims under Federal Law.

PARTIES

6. Plaintiff John Gumersell is a New Jersey resident. Mr. Gumersell paid a "Fuel Surcharge" to Nestle on multiple occasions, as recently as November 2016.

7. Defendant Nestle Waters North America, Inc. is a Delaware entity with its principal place of business at 900 Long Ridge Road, Building 2, Stamford, CT, 06902. Nestle does business in New Jersey and its appointed agent for service of process is The Corporation Trust Company, 820 Bear Tavern Road, West Trenton, New Jersey, 08628.

CLASS REPRESENTATION ALLEGATIONS

8. Plaintiff brings this action as a class action under New Jersey law and proposes the following class:

> All persons and entities who reside in New Jersey who paid Nestle Waters North America or any of its divisions or brands a "Fuel Surcharge" from six years before filing of this action to the date of class notice.

9. Excluded from the proposed class are members of the judiciary, entities currently in bankruptcy, entities whose obligations have been discharged in bankruptcy, and governmental

entities. Also excluded from the class are those customers who executed a valid, binding arbitration agreement, but such customers are only excluded for the time period that such arbitration agreement was in effect.

10. Plaintiff maintains the right to create additional subclasses or classes, if necessary, and to revise these definitions to maintain a cohesive class that does not require individual inquiry to determine liability.

11. The exact number of class members is unknown to Plaintiff at this time, but such information can be ascertained through appropriate discovery, specifically from records maintained by Nestle and its agents. Upon information and belief, the number of putative members of each class exceeds 60 persons and entities.

EXISTENCE AND PREDOMINANCE OF COMMON QUESTIONS OF LAW AND FACT

12. There are common questions of law and fact common and of general interest to the class. These common questions of law and fact predominate over any questions affecting only individual members of the class. Such common questions include, but are not limited to, the following:

a. Whether Nestle charges excessive amounts for its Fuel Surcharge.

b. Whether the Fuel Surcharge is directly related to Nestle's increased cost of fuel or actual cost of fuel.

c. Whether Nestle uses the Fuel Surcharge to offset its increased fuel costs.

d. Whether the Fuel Surcharge fluctuates as Nestle's actual fuel costs fluctuate.

e. Whether Nestle's use of the term "Fuel Surcharge" is deceptive.

g. Whether Nestle has misrepresented facts about the Fuel Surcharge.

h. Whether Nestle has omitted material facts about the Fuel Surcharge.

i. Whether the Fuel Surcharge bears any relation to Defendants' increased costs of fuel or its actual cost of fuel.

j. Whether Nestle's representations and omissions regarding the Fuel Surcharge constitute a deceptive trade practice.

k. Whether Nestle has been unjustly enriched by charging the Fuel Surcharge.

l. Whether the term "Fuel Surcharge" is likely to mislead a reasonable person.

o. Whether the same law applies to all class members' claims.

p. Whether Plaintiff and class members are entitled to class relief as requested herein.

q. Whether Nestle is recovering for the same alleged cost twice, i.e. once in the actual rate and then again in the actual surcharge or fee.

r. Whether amounts of Fuel Surcharges charged to Nestle customers are "unfair" under

TYPICALITY AND NUMEROSITY

13. The claims of the named Plaintiff are typical of the claims of the class. Upon information and belief, the total number of members of each putative class exceeds 60 members and is so numerous that separate joinder of each member is impracticable.

ADEQUATE REPRESENTATION

14. Plaintiffs will fairly and adequately protect the interests of the members of the class and have no interest antagonistic to those of other class members. Plaintiff has retained class counsel competent to prosecute class actions and such class counsel is financially able to represent the classes.

SUPERIORITY

15. The class action is superior to other available methods for the fair and efficient adjudication of this controversy since individual joinder of all members of the class is impracticable. The

interests of judicial economy favor adjudicating the claims for the Plaintiff class rather than on an individual basis. The class action mechanism provides the benefit of unitary adjudication, economies of scale and comprehensive supervision by a single court.

16. Questions of law and fact predominate over any questions affecting only individual members.

FACTUAL ALLEGATIONS

17. John Gumersell is an individual residing in Bridgewater Township, New Jersey. Nestle is the largest seller of bottled water and other beverages in the United States with over fifteen brands of beverages[1]. Nestle offers bottled water and other beverages for sale and delivery to the public. As with all its customers, Nestle charged Plaintiff a certain rate for the beverages. But in addition to this amount, Nestle also charged Plaintiff the Fuel Surcharge that is the subject of this lawsuit.

18. Nestle charges the Fuel Surcharge purportedly to recover the increased fuel costs it incurs in providing beverages to its customers. Nestle represents that the Fuel Surcharge is directly related to its increased cost of fuel, that this fee fluctuates as Nestle's fuel cost fluctuates, and that this fee is used to offset those increased fuel costs. By using the term "Fuel Surcharge"— a term which Nestle has uniformly used on every invoice received by every Class Member charged this fee—Nestle represents that this fee is directly related to its increased fuel costs and that this fee will be used to defray such costs.

19. In actuality, the "Fuel Surcharge" is unrelated to Nestle's actual or increased fuel costs, and certainly is not charged to defray those increased costs. The Fuel Surcharge does not vary or fluctuate in accordance with Nestle's actual increased fuel costs and the method by which

[1] Nestle brands include Acqua Panna, Arrowhead, Dear Park, Ice Mountain, Nestea, Nestle Pure Life, Ozarka, Perrier, Poland Spring, Resource Natural Spring Water, S. Pellegrino, San Pellegrino, Sweet Leaf Iced Teas, Tradewinds, and Zephyrhills.

Nestle determines the fuel surcharge has no relation to its increased fuel costs or any changes in those costs. Nestle has done no legitimate analysis to determine the proper amount of the Fuel Surcharge in connection to its increased fuel costs. Nestle does not apply the money received from the Fuel Surcharge to offset its increased fuel costs; rather, it is recognized as revenue and contributes directly to Nestle's profit. Additionally, the increased fuel costs Nestle purportedly recovers through the Fuel Surcharge are already recovered in whole through the rates it charges for the beverages its delivers to customers. This rate includes the individual component costs of Nestle's business, including—specifically—the costs of fuel and other overhead.

20. Nestle also has omitted material facts regarding the Fuel Surcharge. For example, Nestle does not disclose that the Fuel Surcharge is not related to Nestle's increased fuel or actual fuel costs, that the Fuel Surcharge is not applied to Nestle's fuel costs, and that the Fuel Surcharge is recognized as profit. Nestle does not disclose its actual fuel costs to customers nor does it disclose the actual methodology used to calculate the Fuel Surcharge. In truth, Nestle devised, implemented, and set the amount of the "Fuel Surcharge" simply to increase their profits without any intent of recovering the increased fuel costs they incur in servicing customers.

21. Nestle, at some time in the past, did not charge Fuel Surcharges to its customers. Any purported fuel costs were recovered in the service rate, the same as other overhead costs. Nestle, however, figured out that it could substantially increase revenue by charging this deceptive fee as set out herein. Nestle recovers the same alleged costs twice from its customers. Such practice constitutes "double-dipping."

22. Nestle has consistently and continually misrepresented the nature and purpose of the Fuel Surcharge. It does so to mislead its customers into believing that this is a legitimate fee which

is directly related to increased fuel costs Nestle incurs in delivering bottled water and other beverages to customers. This practice was designed by Nestle to deceive its customers, and is likely to deceive those customers acting reasonably under the circumstances. Nestle's misrepresentations, omissions, and deceptive practices did in fact deceive Plaintiff and Nestle's other New Jersey customers to their detriment, in that each paid a Fuel Surcharge.

FIRST CAUSE OF ACTION

VIOLATION OF NEW JERSEY'S CONSUMER FRAUD ACT

23. All allegations and paragraphs in this complaint are incorporated by reference.

24. New Jersey's Consumer Fraud Act ("CFA") prohibits "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby...." (N.J. Stat. Ann. § 56:8-2).

25. The business activities of Nestle described above constitute the sale or advertisement of merchandise within the meaning of the NJCFA. See N.J.S.A. 56:8-1.

26. Plaintiff and each member of the putative class, as "persons" under the CFA (N.J. Stat. Ann. § 56:8-2), have been harmed by Nestle's unconscionable, deceptive, and unfair acts and practices in the charging of the Fuel Surcharge. By using the term "Fuel Surcharge", Nestle characterizes the fee as a legitimate charge which is designed to recover the increased fuel costs it incurs in delivering products to its customers, and which is used to offset such costs. In truth, the fee bears no relation to any increased costs nor any actual costs incurred by Nestle

and the fee is not used to offset any actual or increased costs. Further, Nestle already recovers any fuel it might incur through the service rate Nestle charges for its products ("double-dipping").

27. By using the term "Fuel Surcharge", Nestle characterizes the improper fee as s legitimate charge, but such fee is nothing more than a profit enhancer for Nestle and is otherwise improper. Nestle has deceived and misled Plaintiff and putative class members in that the improper Fuel Surcharge serves no purpose other than to increase Nestle's profits and because such improper Fuel Surcharges are excessive and bear no relation to any actual cost incurred by Nestle. Nestle has performed no cost analysis to determine whether the Fuel Surcharge actually charged bears any relation to the costs incurred by Nestle. Nestle's misrepresentations, omissions, and deceptive practices as set out in this Class Action Complaint are likely to mislead reasonable customers under the circumstances.

28. Specifically, Nestle's deceptive practices directed toward Plaintiff and putative class members include:

a. Nestle's failure to disclose the excessive amount it charges for its Fuel Surcharge;

b. Nestle's representation that the Fuel Surcharge is directly related to its increased cost of fuel or actual cost of fuel;

c. Nestle's representation that the Fuel Surcharge is used to offset its increased fuel costs;

d. Nestle's failure to disclose that the Fuel Surcharge does not fluctuate as Nestle's actual fuel costs fluctuate;

e. The representation that the Fuel Surcharge is actually a fuel surcharge;

f. The failure to disclose that the Fuel Surcharge has nothing to do with Nestle's actual cost of fuel;

g. The representation that the Fuel Surcharge is related to Nestle's increased costs of fuel or its actual cost of fuel;

h. The failure to disclose that Nestle's actual cost of fuel is not a factor in Nestle's Fuel Surcharge calculation;

i. Nestle's failure to disclose to its customers that it is recovering for the same alleged cost twice, i.e. once in the actual rate and then again in the actual surcharge;

j. Additional deceptive practices as set out in this Class Action Complaint.

29. Nestle's misrepresentations, omissions, and deceptive practices as set out herein are likely to mislead reasonable consumers under the circumstances.

30. Nestle's actions or inactions directed toward Plaintiff and putative class members are also unfair. Such actions or inactions include:

a. Charging Plaintiff and putative class members for the same alleged costs twice, i.e. "double dipping";

b. Charging excessive amounts for Fuel Surcharge;

c. Charging for a Fuel Surcharge that bears no relation to Nestle's actual or increased fuel costs;

d. Charging for a Fuel Surcharge which does not include Nestle's actual costs in the calculation of the fee;

e. Charging Plaintiff and putative class members a Fuel Surcharge even when Nestle's actual fuel costs decrease.

f. Charging Plaintiff and putative class members the Fuel Surcharge when the fee is waived for other New Jersey customers.

31. As a result of the deceptive and unfair practices described above, Plaintiff and each putative class member paid the improper Fuel Surcharges to their detriment.

SECOND CAUSE OF ACTION

UNJUST ENRICHMENT

32. All allegations and paragraphs in this complaint are incorporated by reference.

33. To the extent necessary, this count is pled in the alternative to the previous counts.

34. Nestle received money from Plaintiff and each member of the putative class through the charging of Fuel Surcharges that are fraudulent, deceptive, unfair, and unrelated to Nestle's actual or increased costs. The benefit conferred by Plaintiff and each member of the putative class was non-gratuitous and Nestle realized value from this benefit. It would be inequitable for Nestle to retain this benefit.

PRAYER FOR RELIEF

Plaintiff, on behalf of himself and each member of the putative class, demands all remedies and damages available to it, including repayment of all Fuel Surcharges and a declaration that the practices describe above are deceptive or unfair trade practices under the New Jersey Consumer Fraud Act, restitution, interest, and the attorneys' fees and costs incurred in bringing this action.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury on all Counts and as to all issues.

Date: 1|9|17

Respectfully submitted,
HENINGER GARRISON DAVIS, LLC

By: ______________________
Taylor C. Bartlett, N.J. Bar no. 142752015
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*Application for admission *pro hac vice* to be filed

Attorneys for Plaintiff

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:24-4, Taylor C. Bartlett is hereby designated as trial counsel.

Date: 1/4/17

Respectfully submitted,

HENINGER GARRISON DAVIS, LLC

By: ______________________

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EXHIBIT B

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN GUMERSELL,	Civil Action No.
Plaintiff,	[Superior Court of New Jersey, Law Division, Somerset County, Docket No. SOM-L-19-17]
v.	
NESTLÉ WATERS NORTH AMERICA INC.,	**DECLARATION OF ERIC LORD**
Defendant.	

I, Eric Lord, make the following Declaration under penalty of perjury:

1. I have personal knowledge of the facts stated herein, and I am competent to testify if called upon as a witness herein.

2. I am the Director of Customer Experience of Nestlé Waters North America Inc. ("NWNA"). In my capacity as Director of Customer Experience, I

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am knowledgeable about the invoicing of NWNA customers, including the invoicing for products which it delivers to its home and office customers.

3. Based on NWNA's records reflecting its invoicing of customers in New Jersey since January, 2011: More than 100 New Jersey customers have paid a Fuel Surcharge which exceeds $5,000,000.

CERTIFICATION UNDER 28 U.S.C. §1746

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 2, 2017.

ERIC LORD